UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**JOINTLY ADMINISTERED UNDER CASE NO. 10-38652**
DUKE AND KING ACQUISITION CORP.,	Court File No. 10-38652
Debtors.	Court File Nos:
(includes:	
Duke and King Missouri, LLC;	10-38653 (GFK)
Duke and King Missouri Holdings, Inc.;	10-38654 (GFK)
Duke and King Real Estate, LLC;	10-38655 (GFK)
DK Florida Holdings, Inc.)	10-38656 (GFK)
	Chapter 11 Cases Judge Gregory F. Kishel

NOTICE OF HEARING AND MOTION TO CONVERT DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7

TO: The Debtors and all parties listed on the attached certificate of service:

1. Bank of America, National Association (the "Bank"), pursuant to 11 U.S.C. § 1112(b)(1) hereby submits this motion ("Motion") to convert the Chapter 11 cases of Duke and King Acquisition Corp. et al. (collectively the "Debtors") to cases under Chapter 7, and gives notice of hearing herewith.

2. The Court will hold a hearing on this Motion at 9:30 a.m. on Monday, January 10, 2011, in Courtroom 2A of the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.

3. Any response to this Motion must be filed and served by delivery no later than Wednesday, January 5, 2011, which is five days before the time set for the hearing.

UNLESS A RESPONSE TO THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING UNDER LOCAL RULE 9013-2(f).

JURISDICTION

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory basis for the relief sought in this Motion is 11 U.S.C. § 1112(b)(1). In support of the Motion, the Bank respectfully states as follows:

FACTUAL BACKGROUND

A. The Debtors' Restaurants.

6. On December 4, 2010 (the "Petition Date"), the Debtors filed voluntary petitions under chapter 11 in this Court. As the Debtors make clear in their first day papers, they are in the business of operating Burger King-franchised restaurants. (Notice of Hearing And Joint Motion For (I) Expedited Relief And (II) Interim And Final Orders (A) Authorizing Debtors' Use Of Unencumbered Cash Or, In the Alternative, Cash Collateral and (B) Granting Adequate Protection, [D.I. 8] (the "Cash Collateral Motion") at ¶ 12.)

7. In particular, Debtors Duke and King Acquisition Corp. ("D&K Acquisition") and Duke and King Missouri, LLC ("D&K Missouri" and together with D&K Acquisition, the "Franchise Debtors") operated 92 Burger King restaurants pursuant to various franchise agreements. (*Id*. at ¶ 40.)

8. In March 2010, Burger King Corporation ("Burger King") sued the Franchise Debtors for breach of post-termination obligations under certain of Burger King's franchise agreements. (*Id*. at ¶ 18.) To resolve this litigation, Burger King, the Franchise Debtors, and

certain of the Franchise Debtors' insiders, executed a Limited License Agreement on June 30, 2010 (the "Limited License Agreement"). (*Id.*) Under the Limited License Agreement, Burger King granted the Franchise Debtors a limited license to operate 52 of their franchised locations until December 30, 2010. (*Id.*) Debtors' counsel has informed the Bank that Burger King has agreed to extend this deadline to January 21, 2011. After this date, the Debtors will no longer have the authority to operate a majority of their locations as Burger King restaurants without further extensions from Burger King.

9. Additionally, as the Debtors' first day motions also make clear, the Debtors are unable to pay their post-petition obligations to Burger King as they come due, and each month the Debtors operate they continue to incur significant post-petition administrative expenses. (Cash Collateral Motion, at Ex. A.). Additionally, there is no possibility of a reorganization of the Debtors' existing business absent an influx of capital which has not been forthcoming. As a result, the Debtors intend to use the chapter 11 process to market and sell their assets.

B. The Bank's Credit Agreement.

10. The Bank is an interested party in this case by virtue of its status as a secured creditor. On November 1, 2006, the Bank and the Debtors entered into a credit agreement (as amended, the "Credit Agreement").[1] Pursuant to the Credit Agreement, the Bank loaned $33,262,000.00 to the Debtors. As of the Petition Date, $10,884,777.65 remained outstanding on account of principal, $111,447.77 on account of interest and $6,685.47 on account of fees and

[1] Copies of the Credit Agreement, the Security Agreement (as defined below) and various additional documents pertinent to the Bank's relationship with the Debtors are annexed to the Stipulation of Admissibility and Facts, dated as of December 7, 2010 (the "Stipulation") [D.I. 30]

expenses.[2] Additionally, as of December 3, 2010, the Debtors were liable to the Bank under a swap agreement dated as of November 10, 2006 in the amount of $704,400.

11. The Debtors also executed a security agreement (as amended, the "Security Agreement"), pursuant to which the Debtors granted the Bank a security interest in, among other things, all of the Debtors' inventory, accounts, equipment and supplies, licenses, contracts and leases, general intangibles, deposit accounts, negotiable collateral, furniture and fixtures, investment property, cash and miscellaneous items (including, all other property and assets of whatever type or description not included above), and all proceeds and products of the foregoing. The Debtors also executed leasehold mortgages with respect to a substantial number of their leased locations. The Bank perfected its security interests in the collateral by duly recording the leasehold mortgages and by filing UCC financing and fixture filings in the appropriate jurisdictions.

C. The Debtors Continue To Lose Money After The Petition Date.

12. The Debtors have suffered declining revenues and same store sales for the last two years. (Cash Collateral Motion at ¶ 17.) Additionally, their rights under the Limited Licensing Agreement end on December 30, 2010. (Stipulation at Ex. P.) However, the Debtors have informed the Bank's counsel that, notwithstanding the stated expiration of the Limited License Agreement, Burger King has agreed to temporarily extend the Debtors' rights under the Limited License Agreement until January 21, 2011. But, if Burger King fails to extend the Limited License Agreement in the future, the Debtors will no longer be able to operate their locations as Burger King restaurants.

[2] Of the amount outstanding, (i) D&K Acquisition is liable for principal in the amount of $9,247,143.89, interest in the amount of $110,285.81 and fees and expenses in the amount of $6,413.28, and (ii) Duke and King Real Estate, LLC is liable for principal in the amount of $1,637,633.76, interest in the amount of $1,161.96 and fees and expenses in the amount of $272.19.

13. Even if the Debtors can continue to operate as Burger King restaurants after January 21, 2011, their own pleadings demonstrate that they will operate at a substantial loss. In particular, the Debtors have only provided for the monthly payment of $25,000 local advertising fees owing to Burger King under the Franchise Debtors' various franchise agreements and the Limited Licensing Agreement. (Cash Collateral Motion at Ex. A.) However, according to the Debtors' own estimates, these amounts accrue at approximately $665,000 per month. (Cash Collateral Motion at ¶ 41.) The fees for each location are equal to a total of 8.5% of the *gross* monthly sales. (Stipulation, Ex. R at p. 5; Ex. P at pp. 4-5.) At the first day hearings, counsel for the Debtors admitted that the amount of post-petition royalties and national advertising fees owed to Burger King will continue to accrue at approximately $640,000 per month. While Burger King may have agreed to defer payment of these royalties and advertising expenses, ultimately, if the Debtors hope to sell their business, they, or the purchaser, will have to cure these amounts.

14. Based on the Debtors' own budget, the Debtors anticipate they will have $536,424 cash available on December 31, 2010. (Cash Collateral Motion, at Ex. A.) However, if the Debtors were to pay the $640,000 of royalties and national advertising fees for the month of December rather than accruing such amounts, the Debtors' projected available cash on December 31 would be negative $103,576. The Debtors' cash situation does not improve as the months go on. On March 25, 2011, at the end of their sixteen week budget, the Debtors anticipate having $579,510 in cash on hand. (*Id.*) However, between the Petition Date and the end of March, 2011, approximately $2,560,000 in Burger King royalties and national advertising expenses will accrue. If the Debtors paid those amounts rather than accruing them, they would

have a projected cash shortfall of $1,980,490 by March 25, 2011. Based on the Debtors' own budget, they are incapable of paying their post-petition debts as they accrue.

15. Additionally, the Debtors have substantial outstanding capital expenditure obligations of approximately $7-8 million pursuant to agreements with Burger King ("CapEx Liability"). Indeed, the Debtors admit that CapEx Liability has been a consistent drain on their performance. (Cash Collateral Motion at ¶ 16.) For example, store number 06609 has a CapEx Liability of $318,000, and the aggregate CapEx Liability for the Debtors' eight worst performing stores is over $2,000,000. *See* Store Valuation Analysis attached to this Memorandum as Exhibit A.

16. The Debtors' continuing failure to pay the CapEx Liability, or pay royalties and advertising fees as they come due, ultimately shifts these costs to the non-Burger King creditors, because any purchaser who wishes to operate a store as a Burger King restaurant will have to cure the Debtors' defaults under the related franchise agreement, including the Debtors' failure to make required capital improvements or pay royalties and advertising fees. Since the Debtors have no other funds with which to pay those liabilities, they will necessarily result in a reduction to the purchase price the Debtors can command for their assets and, therefore, a lower recovery for the creditors.

D. The Insider Guarantees.

17. As part of the various franchise agreements and the Limited License Agreement, Duke and King Holdings, LLC,[3] Rodger Head, Robert Murphy, and Thomas Metzger (collectively, the "Insider Guarantors") all insiders of the Debtors, agreed to guarantee certain amounts owing to Burger King by the Franchise Debtors. (Stipulation, at Ex. P at p. 1, 5.)

[3] Duke and King Holdings, LLC is 100% owner of DK Acquisition, which in turn owns the remaining Debtors.

These amounts include the royalties and advertising payments that the Debtors continue to accrue. (*Id*. at 5.) The Insider Guarantors' individual liabilities to Burger King provide a powerful incentive to manage these Chapter 11 cases for the benefit Burger King and to limit their own personal guaranty liability rather than manage the cases for the benefit of all creditors.

18. Permitting the Debtors to continue operating their poorly performing stores while accruing post-petition royalties and advertising payments benefits only Burger King and the Insider Guarantors. The Insider Guarantors have a strong incentive to see to it that all of the Debtors' restaurants – including the restaurants with negative sale values – remain open and are sold. In connection with such a sale, and the assumption and assignment of the related franchise agreement to the purchaser, the Debtors will have to cure any unpaid Burger King royalty and advertising fees – including prepetition royalties and advertising fees -- effectively eliminating the Insider Guarantors' personal obligations to Burger King. Likewise, Burger King benefits because all of its unpaid franchise fees and advertising expenses will get paid, it will continue to have operating Burger King franchise locations, and the new purchaser will pay the related CapEx Liabilities. Because the Debtors clearly do not have any ability to make cash payments for the royalties, national advertising fees, and other administrative expenses, the only way they will get paid is by the purchaser. Therefore, a purchaser will factor in those amounts when deciding how much it will bid for a restaurant location and reduce the cash bid for the restaurants by the amount of the CapEx Liabilities and royalties and national advertising expenses. The result is that the value of the stores to Bank of America and the bankruptcy estate will continue to decrease over time, especially with respect to the stores that already have a negative sale value.

E. No Intent Or Ability To Rehabilitate.

19. The Debtors do not intend to rehabilitate their businesses under Chapter 11. The terms of the Limited License Agreement require that the Franchise Debtors sell a majority of their operating locations. (Stipulation at Ex. P at p. 4, 6.) In addition, as the Debtors counsel has stated before this Court, the Debtors' ultimate intention is to arrange a sale of the Debtors' restaurant locations.

20. However, even if the Debtors did not intend to sell their restaurant locations, the Debtors' own cash projections show that any rehabilitation would be impossible if one includes the accruing royalties and national advertising fees.

21. It is in the best interest of the estate and the Debtors' creditors for the estate to be administered by an independent chapter 7 trustee who could monetize and distribute the Debtors' remaining assets subject to the Court's continued supervision and jurisdiction.

NOTICE OF WITNESSES

22. Pursuant to Local Rule 9013-2(c), counsel for the Bank gives notice that it may call Salvatore LoBiondo, Jr., Senior Managing Director for Marotta Gund Budd & Dzera, LLC, and Anthony D. Healey, Senior Vice President for the Bank, to testify regarding the matters set forth in this Motion.

RELIEF REQUESTED

23. Pursuant to 11 U.S.C. § 1112(b)(1), the Bank requests that the Bankruptcy Court

convert, for cause, the Debtors' chapter 11 cases to chapter 7 cases.

FAEGRE & BENSON LLP

Dated December 20, 2010

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Exhibit A

Duke and King Acquisition

Store Valuation Analysis

10/28/10

Revised Scenario 11/4/10

Store #	Address	City	State	FA Expires	Lease Expires	TTM Period 10 Sales	Total CapEx	SLEBITDA less Alloc G&A	Estimated Sales Price 4.0x Multiple	Est. Sale Price net of CapEx 4.0x Multiple	Negative Net Sales Price 4.0x Multiple
BKC Close List (assumed)											
10748	678 West 14th Street	Chicago Heights	IL	5/21/2017	8/31/2025	638,085	25,000	(129,598)	(518,392)	(543,392)	
03203	4121 Sauk Trail	Richton Park	IL	6/29/2020	8/31/2025	872,775	58,000	(127,768)	(511,073)	(569,073)	
11143	120 Elm Street	Farmington	MN	9/29/2017	8/31/2025	686,261	25,000	(106,682)	(426,728)	(451,728)	
10725	1312 S. Madison Street	Webb City	MO	4/21/2017	12/31/2018	$ 534,761	$ 35,000	$ (177,222)	$ (708,887)	$ (743,887)	
09907	1710 Maiden Lane	Joplin	MO	11/10/2016	12/31/2018	718,099	35,000	(96,361)	(385,446)	(420,446)	
					Subtotal	3,449,980	178,000	(637,631)	(2,550,525)	(2,728,525)	
					Store Count	5					
Remaing D&K Close List											
00106	901 North Lake Street	Aurora	IL	2/27/2021	2/27/2021	946,767	75,000	(34,059)	(136,234)	(211,234)	(211,234)
09744	1429 Main Street	Parsons	KS	5/10/2019	9/17/2028	772,071	75,000	(32,224)	(128,897)	(203,897)	(203,897)
11751	808 S Illinois Avenue	Republic	MO	7/28/2018	1/7/2029	638,957	75,000	(55,458)	(221,833)	(296,833)	(296,833)
08964	1220 E. Republic Road	Springfield	MO	6/6/2015	12/31/2018	813,285	35,000	(51,970)	(207,882)	(242,882)	(242,882)
06609	3020 E. Sunshine Street	Springfield	MO	2/28/2010	12/31/2018	817,665	318,000	(39,045)	(156,181)	(474,181)	(474,181)
01558	1411 S. Range Line Road	Joplin	MO	9/18/2010	8/26/2028	936,138	316,700	2,462	9,849	(306,851)	(306,851)
04111	3500 South Moorland Road	New Berlin	WI	7/7/2014	7/7/2014	817,730	25,000	(45,980)	(183,919)	(208,919)	(208,919)
11191	2789 Milwaukee Road	Beloit	WI	1/17/2018	1/17/2018	805,158	25,000	(33,124)	(132,496)	(157,496)	(157,496)
					Subtotal	6,547,772	944,700	(289,399)	(1,157,594)	(2,102,294)	(2,102,294)
					Store Count	8					
Additional Stores Not to be Sold											
05971	1710 DeKalb Avenue	Sycamore	IL	2/28/2010	8/31/2025	971,933	312,500	(46,888)	(187,553)	(500,053)	(500,053)
05960	2001 Center Avenue	Janesville	WI	2/28/2010	8/31/2025	843,873	325,000	(4,499)	(17,995)	(342,995)	(342,995)
04334	2423 Rockingham Road	Davenport	IA	8/31/2025	8/31/2025	945,628	325,000	5,766	23,065	(301,935)	(301,935)
07204	1699 W. Jackson Street	Ozark	MO	8/13/2011	5/29/2028	838,277	320,000	28,094	112,377	(207,623)	(207,623)
06030	1011 W. Central Avenue	Carthage	MO	2/28/2010	8/14/2028	959,885	310,000	32,294	129,175	(180,825)	(180,825)
					Subtotal	4,559,596	1,592,500	14,767	59,070	(1,533,430)	(1,533,430)
					Store Count	5					
Stores to be Sold											
09934	120 Meridian Drive	New Richmond	WI	7/23/2011	7/23/2011	703,746	125,000	(10,484)	(41,935)	(166,935)	(166,935)
12757	1287 N Main St	River Falls	WI	10/15/2019	8/31/2025	861,492	25,000	(33,412)	(133,650)	(158,650)	(158,650)
04857	822 Windsor Street	Sun Prairie	WI	2/27/2012	2/28/2012	856,484	40,000	(23,342)	(93,367)	(133,367)	(133,367)
07557	8501 Springbrook Drive NW	Coon Rapids	MN	11/13/2012	8/31/2025	829,175	25,000	(27,038)	(108,150)	(133,150)	(133,150)
06545	1022 E Blue Earth Avenue	Fairmont	MN	2/28/2010	8/31/2025	916,844	312,500	48,862	195,448	(117,052)	(117,052)
12413	315 N. Massey Blvd	Nixa	MO	6/9/2019	2/28/2024	701,490	62,500	(11,670)	(46,680)	(109,180)	(109,180)
04507	13840 Grove Drive	Maple Grove	MN	6/26/2015	6/26/2015	996,282	25,000	(15,899)	(63,596)	(88,596)	(88,596)
07937	2411 Center Drive	Hudson	WI	6/17/2013	8/31/2025	1,060,062	60,000	(6,138)	(24,551)	(84,551)	(84,551)
00437	1138 East State Street	Rockford	IL	9/8/2019	9/8/2019	1,038,814	75,000	(1,618)	(6,472)	(81,472)	(81,472)
16573	2320 Route 34	Oswego	IL	6/1/2028	7/31/2028	1,111,536	-	(19,979)	(79,918)	(79,918)	(79,918)
04122	5020 160th Street SE	Prior Lake	MN	7/14/2014	7/14/2014	881,144	25,000	(10,982)	(43,926)	(68,926)	(68,926)
10234	7510 East State Street	Rockford	IL	9/18/2016	8/15/2011	944,284	25,000	(10,919)	(43,677)	(68,677)	(68,677)
09366	400 Center Way	Janesville	WI	12/13/2015	8/31/2025	933,451	25,000	(7,440)	(29,761)	(54,761)	(54,761)
04151	1150 East Highway 13	Burnsville	MN	9/30/2014	8/31/2025	1,032,535	25,000	(5,814)	(23,255)	(48,255)	(48,255)
01764	2655 East Washington	Madison	WI	11/30/2016	9/30/2012	1,085,439	25,000	(5,720)	(22,879)	(47,879)	(47,879)
00111	18459 South Halsted Street	Glenwood	IL	6/29/2020	8/31/2025	1,056,323	53,000	4,536	18,144	(34,856)	(34,856)
09095	106 Ninth Avenue Circle South	Princeton	MN	6/1/2015	6/2/2010	774,426	25,000	16,372	65,488	40,488	
01747	209 Norris Drive	Ottawa	IL	5/31/2016	5/31/2011	984,313	227,500	59,967	239,866	12,366	
00255	913 West Lincoln Highway	DeKalb	IL	10/31/2016	11/1/2011	962,344	25,000	6,406	25,623	623	
05539	1101 S. Limit Avenue	Sedalia	MO	2/28/2027	7/30/2028	1,208,127	325,000	86,967	347,868	22,868	
01227	935 W. Kearney	Springfield	MO	2/28/2010	10/6/2028	1,164,492	300,000	82,269	329,076	29,076	
06590	1215 Gun Club Road	White Bear Lake	MN	2/28/2010	11/20/2014	1,190,095	263,577	70,115	280,459	16,882	
02641	2011 E Main Street	Albert Lea	MN	6/19/2018	8/31/2025	1,003,631	25,000	18,349	73,397	48,397	
09994	318 East Kraft Drive	Melrose	MN	8/27/2016	7/14/2011	827,415	25,000	25,461	101,844	76,844	
12250	925 Washington Ave SE	Minneapolis	MN	12/26/2018	12/31/2013	1,209,940	25,000	10,928	43,711	18,711	
09332	5358 West Broadway Ave	Crystal	MN	9/27/2015	8/31/2025	999,885	50,000	20,581	82,324	32,324	
04201	5231 N Brady Street	Davenport	IA	6/29/2020	8/31/2025	989,755	60,000	23,292	93,167	33,167	
04553	1501 NW 7th Street	Faribault	MN	6/27/2025	6/30/2025	1,121,914	25,000	26,839	107,357	82,357	
04043	229 West Kimberly Road	Davenport	IA	6/29/2020	8/31/2025	988,329	65,000	36,471	145,883	80,883	

Store #	Address	City	State	FA Expires	Lease Expires	TTM Period 10 Sales	Total CapEx	SLEBITDA less Alloc G&A	Estimated Sales Price 4.0x Multiple	Est. Sale Price net of CapEx 4.0x Multiple	Negative Net Sales Price 4.0x Multiple
03792	4980 South 76th Street	Greenfield	WI	7/30/2017	7/31/2017	1,080,172	25,000	34,186	136,744	111,744	
09331	1317 Preacher Roe Blvd	West Plains	MO	10/15/2015	5/11/2020	889,913	65,500	43,773	175,092	109,592	
09256	255 Triangle Lane N Ste 2	Jordan	MN	8/20/2010	8/20/2010	961,951	125,000	42,241	168,963	43,963	
06299	10801 Bloomington Ferry Road	Bloomington	MN	7/22/2026	7/11/2026	1,018,267	25,000	42,532	170,128	145,128	
09993	10861 University Avenue NE	Blaine	MN	8/23/2016	7/14/2011	1,036,326	50,000	42,294	169,178	119,178	
10239	244 Grand Avenue	St Paul	MN	10/31/2016	8/31/2025	1,012,149	50,000	45,055	180,219	130,219	
11535	8481 SE Point Douglas Road	Cottage Grove	MN	2/19/2018	6/25/2011	1,036,610	65,000	47,222	188,887	123,887	
05357	1022 Kings Highway Street	Rolla	MO	2/28/2027	6/23/2028	1,020,698	50,000	52,810	211,240	161,240	
03232	3009 S. Campbell Avenue	Springfield	MO	6/29/2020	12/31/2018	1,304,263	60,000	42,768	171,073	111,073	
06270	8510 Edinburgh Center Drive	Brooklyn Park	MN	6/29/2020	8/31/2025	1,253,506	60,000	45,197	180,787	120,787	
11877	504 West Blackhawk Drive	Byron	IL	9/22/2018	8/31/2025	1,176,313	60,000	53,616	214,465	154,465	
01888	2624 Milton Avenue	Janesville	WI	1/17/2012	8/31/2025	1,113,425	40,000	57,693	230,772	190,772	
11682	38711 Tanger Drive	North Branch	MN	6/10/2018	8/31/2025	1,208,393	25,000	62,693	250,771	225,771	
02160	1385 Douglas Avenue	Montgomery	IL	8/31/2023	8/31/2013	1,176,202	25,000	64,829	259,317	234,317	
05713	1501 Weir Drive	Woodbury	MN	6/29/2020	10/23/2012	1,263,515	62,000	64,682	258,727	196,727	
08004	3333 Rice Street	Shoreview	MN	8/15/2013	8/31/2025	1,094,256	40,000	75,444	301,776	261,776	
03475	2138 N. Glenstone Avenue	Springfield	MO	6/29/2020	9/15/2028	1,084,727	41,900	78,763	315,052	273,152	
01326	2434 11th Street	Rockford	IL	11/29/2013	11/30/2028	1,030,222	25,000	84,498	337,990	312,990	
04513	1077 S. Jefferson Avenue	Lebanon	MO	3/31/2015	9/30/2014	1,213,102	25,000	78,678	314,711	289,711	
05591	2535 Division Street	North St Paul	MN	6/29/2020	7/18/2020	1,394,612	60,000	75,164	300,658	240,658	
06211	1222 Avenue of the Cities	East Moline	IL	2/28/2010	8/31/2025	1,199,467	312,500	90,064	360,257	47,757	
10284	695 7th Street East	St Paul	MN	9/27/2016	8/15/2011	1,365,981	25,000	85,549	342,196	317,196	
11243	1560 West 4th Street	Rush City	MN	12/31/2017	12/31/2012	1,125,073	25,000	98,039	392,157	367,157	
05012	2025 Northdale Blvd	Coon Rapids	MN	8/31/2025	8/31/2025	1,426,324	25,000	86,066	344,265	319,265	
01752	723 Shooting Park	Peru	IL	9/22/2026	9/22/2011	1,207,555	25,000	97,141	388,563	363,563	
05879	1830 Southwest Avenue	Freeport	IL	10/1/2010	8/31/2025	1,114,817	285,000	102,594	410,375	125,375	
08384	1911 S. Springfield Avenue	Bolivar	MO	5/17/2014	12/28/2024	1,135,662	60,000	108,497	433,987	373,987	
07444	735 Bridge Street	Owatonna	MN	8/12/2012	8/31/2025	1,209,809	25,000	106,112	424,446	399,446	
01060	1450 4th Street	Beloit	WI	10/31/2026	10/31/2026	1,223,605	25,000	107,134	428,535	403,535	
06530	7051 Tenth Street North	Oakdale	MN	2/28/2010	7/23/2014	1,352,654	255,181	103,164	412,658	157,477	
04297	4040 38th Avenue	Moline	IL	12/16/2014	6/30/2026	1,275,409	25,000	108,596	434,383	409,383	
07466	330 North Garden	Bloomington	MN	1/31/2011	1/31/2011	1,249,593	125,000	115,401	461,605	336,605	
09081	1409 4th Street NW	Austin	MN	6/29/2015	8/31/2025	1,221,040	40,000	121,853	487,413	447,413	
07203	525 S. National Avenue	Springfield	MO	9/11/2011	6/1/2028	1,329,485	310,000	129,009	516,037	206,037	
12281	2200 E. Austin Blvd	Nevada	MO	5/29/2019	12/17/2029	1,177,259	69,195	137,827	551,306	482,111	
08224	5105 Edina Industrial Blvd	Edina	MN	12/3/2013	8/31/2025	1,345,686	25,000	140,896	563,583	538,583	
09272	PO 264 403 Fire Monument Road	Hinckley	MN	7/19/2015	8/31/2025	1,478,727	25,000	136,611	546,446	521,446	
11284	1500 Stinson Blvd NE	Minneapolis	MN	1/9/2018	9/16/2017	1,422,757	60,000	139,979	559,915	499,915	
11049	3095 Gardner Edgewood Drive	Neosho	MO	9/15/2017	12/28/2029	1,216,178	63,900	159,527	638,108	574,208	
12415	875 E. Highway 60	Monett	MO	5/20/2028	11/5/2028	1,311,642	72,900	163,606	654,422	581,522	
13091	289 57th Avenue NE	Fridley	MN	3/2/2020	6/30/2026	1,780,334	70,000	156,088	624,350	554,350	
04116	2651 County Road I	Mounds View	MN	6/27/2014	6/30/2026	1,255,982	325,000	181,678	726,713	401,713	
06615	1318 Riverfront Drive	Mankato	MN	2/28/2010	8/31/2025	1,475,110	272,500	194,109	776,435	503,935	
11254	9896 Norma Lane	Woodbury	MN	12/13/2017	12/31/2012	1,505,364	25,000	222,823	891,291	866,291	
04009	14251 Nicollet Avenue	Burnsville	MN	6/29/2020	8/31/2025	1,777,491	40,000	217,653	870,610	830,610	
					Subtotal	83,985,396	5,959,653	4,791,112	19,164,447	13,204,794	(1,476,224)
					Store Count	74					

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**JOINTLY ADMINISTERED UNDER CASE NO. 10-38652**
DUKE AND KING ACQUISITION CORP.,	Court File No. 10-38652
Debtors.	
(includes: Duke and King Missouri, LLC; Duke and King Missouri Holdings, Inc.; Duke and King Real Estate, LLC; DK Florida Holdings, Inc.)	Court File Nos: 10-38653 (GFK) 10-38654 (GFK) 10-38655 (GFK) 10-38656 (GFK)
	Chapter 11 Cases Judge Gregory F. Kishel

Verification

I, Salvatore LoBiondo, Jr., Senior Managing Director for Marotta Gund Budd & Dzera, LLC, declare under penalty of perjury that the facts set forth in paragraphs 12-15 of the foregoing Motion To Convert Debtors' Chapter 11 Cases To Cases Under Chapter 7 are true and correct according to the best of my knowledge, information and belief.

Dated: December 20, 2010

Salvatore LoBiondo, Jr.
Senior Managing Director
Marotta Gund Budd & Dzera

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

JOINTLY ADMINISTERED UNDER CASE NO. 10-38652

DUKE AND KING ACQUISITION CORP.,

Debtors.

Court File No. 10-38652

(includes:
Duke and King Missouri, LLC;
Duke and King Missouri Holdings, Inc.;
Duke and King Real Estate, LLC;
DK Florida Holdings, Inc.)

Court File Nos:

10-38653 (GFK)
10-38654 (GFK)
10-38655 (GFK)
10-38656 (GFK)

Chapter 11 Cases
Judge Gregory F. Kishel

Verification

I, Anthony D. Healey, Senior Vice President for Bank of America, N.A., declare under penalty of perjury that the facts set forth in paragraphs 10-11 of the foregoing Motion To Convert Debtors' Chapter 11 Cases To Cases Under Chapter 7 are true and correct according to the best of my knowledge, information and belief.

Dated: December 20, 2010

Anthony D. Healey
Senior Vice President
Bank of America, N.A.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**JOINTLY ADMINISTERED UNDER CASE NO. 10-38652**
DUKE AND KING ACQUISITION CORP.,	Court File No. 10-38652
Debtors.	
	Court File Nos:
(includes:	
Duke and King Missouri, LLC;	10-38653 (GFK)
Duke and King Missouri Holdings, Inc.;	10-38654 (GFK)
Duke and King Real Estate, LLC;	10-38655 (GFK)
DK Florida Holdings, Inc.)	10-38656 (GFK)
	Chapter 11 Cases Judge Gregory F. Kishel

MEMORANDUM IN SUPPORT OF MOTION TO CONVERT DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7

FACTUAL BACKGROUND

The facts upon which this memorandum is based are set out in the Motion and incorporated herein. Capitalized terms used herein and not otherwise defined are defined in the Motion.

LEGAL ARGUMENT

The Supreme Court has noted that "[t]he preservation of business enterprises must not be at the expense of creditors." *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 119 n.14 (1939) (citation omitted). Section 1112(b)(1) of the Bankruptcy Code provides that the court, on request of a party in interest, *shall* convert or dismiss a case

under chapter 11 to a chapter 7 case absent unusual circumstances if the movant establishes "cause." Section 1112(b)(4) sets forth a non-exhaustive list of factors constituting "cause" for the court to evaluate in determining whether to convert a case from chapter 11 to chapter 7. Here, cause exists to convert the Debtors' chapter 11 cases to cases under chapter 7 because of (i) the substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation and (ii) the presence of other equitable factors favoring conversion.

A. The Debtors are Suffering Continual Losses, Cannot Operate Profitably, and There is No Reasonable Likelihood of Their Rehabilitation.

Section 1112(b)(4)(A) of the Bankruptcy Code provides that a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" is "cause" for the conversion of a chapter 11 case to a chapter 7 case. Here, both elements are satisfied and cause exists to convert the case to chapter 7.

1. The Continuing Accrual of Post-petition Royalties and Advertising Fees to Burger King Constitutes a Continuing Loss to, or Diminution of, the Debtors' Estates.

In determining whether a moving party has shown a continuing loss to or diminution of the estate, the Court must look beyond the bare form of the debtor's filed reports and financial statements and make a full evaluation of the present condition of the estate. *In re Economy Cab & Tool Co.*, 44 B.R. 721, 724 (Bankr. D. Minn. 1984). Courts have held that cause exists under Section 1112(b)(4)(A) of the Bankruptcy Code where the evidence shows "that the debtors had a negative cash flow and no intention of rehabilitating their business." *Loop Corp. v. U.S. Trustee*, 379 F.3d 511, 518 (8th Cir. 2004). The *Loop* court also noted that "a sustained negative cash flow after entry of the order for relief… …is sufficient to

support a finding that the debtor is experiencing a continuing loss to the estate." *Id*. at 515-516. [4] The required diminution need not be substantial. "All that need be found is that the estate has suffered *some* diminution in value." *In re East Coast Airways*, 146 B.R. 325, 336 (Bankr. E.D.N.Y. 1992) (emphasis added). Accordingly, negative cash flow resulting from the debtor's administrative expenses is sufficient to satisfy the first element of section 1112(b)(4)(A). *Loop*, 379 F.3d at 516; *see also In re Schriock Constr., Inc.*, 167 B.R. 569, 575 (Bankr. D.N.D. 1994) (finding that the continuing loss to or diminution of the estate could be established by showing that the debtor incurred continuing losses or maintained negative cash flows); *Matter of 3868-70 White Plains Road Inc.*, 28 B.R. 515, 518 (Bankr. S.D.N.Y. 1983) (evidence of continual negative cash flows is sufficient to satisfy the continuing loss to or diminution of the estate element).

If one were to include Burger King's accruing, but unpaid royalties and national advertising fees (and to arrive at a true and correct picture of the Debtors' financial condition, one must), the Debtors have operated with negative cash flows since the inception of this case, and will continue to do so until they abandon or liquidate their assets. The only way to stanch the bleeding and maximize value for the creditors at this point is for the Debtors to abandon their unprofitable stores and sell substantially all of their assets – in other words, a chapter 7 liquidation.

Accordingly, the Debtors' continuing inability to pay post-petition obligations as they come due satisfies the first element of Section 1112(b)(4)(A).

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[4] Prior to the passage of the Bankruptcy Abuse and Consumer Protection Act of 2005, Pub L 109-8, 119 Stat. 23 (2005), section 1112(b)(4)(A) was codified at 1112(b)(1). Thus, cases decided prior to 2005 cite section 1112(b)(1).

2. There Is No Reasonable Likelihood of Rehabilitation of the Debtors.

The Debtors' intention to sell substantially all of their operating assets, and the absence of any intent to re-establish operations after these cases are closed demonstrate that there is no likelihood of rehabilitation. It is well established that the "reasonable likelihood of rehabilitation" element of Section 1112(b)(4)(A) means that the debtor is able to put itself back into good condition and reestablish its business on a sound basis. *Economy Cab*, 44 B.R. at 725 n.2 (citing *In re L.S. Good & Co.*, 8 B.R. 310 (Bankr. N.D. W.Va. 1980)); *see also Loop*, 379 F.3d at 516 (finding that a debtor with no intention of restoring its business had no reasonable likelihood of rehabilitation). Courts have also held that for there to be a reasonable likelihood of rehabilitation, an operating business must exist for the debtor to reorganize after the confirmation of the plan. *In re Gonic Realty Trust*, 909 F.2d 624, 627 (1st Cir. 1990) (affirming dismissal of a chapter 11 case where there was "no business left to reorganize"); *see also Loop Corp.*, 379 F.3d at 516 ("[I]t is difficult to imagine a liquidating debtor who will not meet the criteria for cause described in section [1112(b)(4)(A)].").

The Debtors have stated that they intend to sell their assets and cease operating. Indeed, a condition of the Limited License Agreement is that the Franchise Debtors sell the 52 locations operating under the Limited License Agreement. Accordingly, there will be no rehabilitated business at the end of this case, and the second element of Section 1112(b)(4)(A) is satisfied.

B. Additional "Causes" Favor Converting the Debtors' Chapter 11 Case to Cases Under Chapter 7.

Additional factors favor converting the Debtors' chapter 11 cases to cases under chapter 7. The list of "causes" in section 1112(b)(4) is "non-exhaustive" and other types of

cause may establish support for conversion of a chapter 11 case to a chapter 7 case. *Gonic*, 909 F.2d at 627 (relying on factors not specifically enumerated in section 1112(b) to dismiss the debtor's chapter 11 case). The court may therefore consider other factors and use its equitable powers to reach the appropriate result. *Id.* Thus, the court need not narrowly analyze a single subsection of section 1112(b)(4) such that all other factors favoring conversion are excluded. *Loop*, 379 F.3d at 515 n.2.

In addition to the Debtors' continuing losses and lack of any prospect of rehabilitation, the Insider Guarantors' relationship with Burger King coupled with the Debtors' intent to liquidate justifies conversion. As this Court has recognized, "administration by a Chapter 7 trustee is the preferred vehicle for liquidation under the Bankruptcy Code" where a chapter 11 debtor seeks to remain in chapter 11 solely for the purpose of liquidating its assets. *In re Minnesota Alpha Found.*, 122 B.R. 89 at 94 n.10 (Bankr. D. Minn. 1990.) Additionally, where liquidation is the central focus of a chapter 11 petition, the court must be cognizant of the "self-interest of management and other professionals in retaining control." *Id.* In this case, the Insider Guarantors' relationship with Burger King creates a powerful conflict of interest. The Insider Guarantors have a significant incentive to ensure that a sale of the Debtors' assets occurs, no matter the price, provided that the sale results in an assumption and assignment of all of the Debtors' franchise agreements with Burger King, even if the terms of a sale are not in the best interests of all creditors. In such a state of affairs, Burger King is able to exercise extraordinary influence in any sale process.

An independent trustee could efficiently monetize or abandon, and distribute the Debtors' remaining assets under the Court's continued supervision and eliminate the

conflicts of interest inherent in the Insider Guarantors' relationships with Burger King. The appointment of a chapter 7 trustee would also avoid the significant time and expense that will be necessary to obtain approval of a disclosure statement and confirm a chapter 11 plan.

These factors further illustrate that converting the Debtors' chapter 11 cases to cases under chapter 7 is necessary and appropriate and will reap significant benefits for creditors.

C. No "Unusual Circumstances" Are Present

The 2005 BAPCPA amendments to section 1112(b) added the requirement that there must not be any "unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interest of creditors or the estate." 11 U.S.C. § 1112(b)(1). Section 1112(b)(1) does not define unusual circumstances, "but the phrase contemplates conditions that are not common in chapter 11 cases." *In re Pittsfield Weaving Co.*, 393 B.R. 271, 274 (Bankr. D.N.H. 2008) (citing *In re Fisher*, 2008 WL 1775123 at *5 (Bankr. D. Mont. Apr. 15, 2008)). Courts have significant discretion in determining whether unusual circumstances exist to establish that conversion to a chapter 7 case is not in the best interest of creditors. *Id*. at 274-75 (citing *In re The 1031 Tax Group, LLC*, 374 B.R. 78, 93 (Bankr. S.D.N.Y. 2007)).

Here, no unusual circumstances are present to justify maintaining the Debtors' cases as chapter 11 proceedings. Instead, these cases present a clear-cut situation where a continuing loss to or diminution of the estate, the admitted lack of a reasonable likelihood of rehabilitation of the debtor, and the presence of other equitable factors compel conversion to chapter 7.

CONCLUSION

Each day, the amount of post-petition royalties and advertising expenses the Debtors owe to Burger King grows. There will be no business enterprise to rehabilitate at the end of this case, as the Debtors intend to sell their assets and liquidate. The Insider Guarantors have significant conflicts of interest that may cause them to operate this case for the benefit of Burger King over the other creditors. Conversion of the Debtors' chapter 11 cases to cases under chapter 7 will prevent continued loss to or diminution of the estate and protect all of the Debtors' creditors. For these reasons, the court should convert the Debtors' chapter 11 cases to cases under chapter 7.

FAEGRE & BENSON LLP

Dated December 20, 2010

/e/ Michael F. Doty

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**JOINTLY ADMINISTERED UNDER CASE NO. 10-38652**
DUKE AND KING ACQUISITION CORP.,	Court File No. 10-38652
Debtors.	
	Court File Nos:
(includes: Duke and King Missouri, LLC; Duke and King Missouri Holdings, Inc.; Duke and King Real Estate, LLC; DK Florida Holdings, Inc.)	10-38653 (GFK) 10-38654 (GFK) 10-38655 (GFK) 10-38656 (GFK)
	Chapter 11 Cases Judge Gregory F. Kishel

ORDER GRANTING MOTION TO CONVERT DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7 PURSUANT TO 11 U.S.C. § 1112(b)(1)

Upon consideration of the Motion of Bank of America, National Association, to convert the above-captioned Debtors' chapter 11 cases to cases under chapter 7 pursuant to 11 U.S.C. § 1112(b)(1), and pursuant to the terms set forth in this Order,

IT IS ORDERED THAT:

1. The Debtors' chapter 11 cases shall be converted to cases under chapter 7 pursuant to 11 U.S.C. § 1112(b)(1).

2. This Court shall retain jurisdiction over any and all issues arising from or related to the implementation and interpretation of this Order.

Dated _________________________

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Gregory F. Kishel
UNITED STATES BANKRUPTCY JUDGE